UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MT. CLEMENS GENERAL HOSPITAL

and

Cases 7–CA–46087
7–CA–46680

RN STAFF COUNCIL, OFFICE AND
PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 40,
AFL-CIO

Ingrid L. Kock, Esq., for the General Counsel.
John P. Hancock, Jr., Esq., of Detroit, Michigan,
for the Respondent.
Scott A. Brooks, Esq., of Detroit, Michigan, for the
Charging Party Union, RN Staff Council, OPEIU, Local 40

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Detroit, Michigan on May 10, and July 7-8, 2004. The consolidated amended complaint alleges that since August 18, 2003, Mt. Clemens General Hospital (Respondent or Hospital) has violated Section 8(a)(3) of the Act by refusing and failing to rehire Vicki Kasper, a former employee and the current President of the RN Staff Council, Office and Professional Employees International Union, Local 40, AFL-CIO (Charging Party Union or Union). It further alleges that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing the terms of a tax sheltered annuity program without bargaining with the Charging Party Union and by failing and refusing to provide certain information requested by the Union.

The Respondent's timely answer denied the material allegations of the amended consolidated complaint. All parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party Union, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is an acute care hospital located in Mt. Clemens, Michigan. In the 12-month period ending December 31, 2003, the Respondent received gross revenues in excess of $250,000 and purchased goods valued in excess of $50,000 from points located outside of the State of Michigan, which were shipped directly to its Mt. Clemens, Michigan facility. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the RN Staff Council, OPEIU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Issues*

1. Did the Respondent unlawfully refuse to rehire Vicki Kasper-Monczk?

2. Did the Respondent unlawfully change the terms of a tax shelter annuity (TSA) pension plan without affording the Union a meaningful opportunity to bargain over

the same?

3. Did the Respondent unlawfully fail and refuse to provide the Union with information concerning the following: changes to the tax shelter annuity; Jodie Zablowski's personnel file; nurse externs and nurse interns; Joy Johnson's personnel file; and the reclaiming of in-patient beds?

B. *The refusal to hire Vicki Kasper*

1. Facts

Vicki Kasper-Monczk (Kasper) is a registered nurse and the president of the Charging Party Union. She was employed by the Respondent from 1992 through July 11, 2003, when she voluntarily resigned.[1]

In 2000, while employed by the Respondent, Kasper voluntarily transferred from a full-time RN position to a "contingent" B nurse position. Under the collective-bargaining agreement, a contingent B nurse is required to work a minimum of 16 hours per 28-day schedule, including 8 weekend hours. (GC Exh. 2, Art. 9;Tr. 28, 420.) Up until January 2003, contingent nurses

1. Kasper remained the Union president, even though she resigned her employment with the Respondent. (Tr. 66.)

were allowed to bid on any shift not taken by a full-time or regular part-time nurse. Once awarded a shift, the successful bidder would retain that shift. (Tr. 29.)

a. Kasper is assigned to the night shift and goes out on union leave

In January 2003, the Respondent discontinued allowing contingent nurses to bid shifts and to self-schedule themselves. Instead, it began assigning them to shifts on a variable basis.[2] Kasper, who had routinely worked the day shift, was assigned by the Respondent to work the afternoon and midnight shifts. (Tr. 30.) A short time later, she phoned Michael Goodwin, president of the Office and Professional Employees International Union, AFL-CIO, CLC, asking him to request a union leave of absence for her.[3] According Kasper, she was unable to work midnight shifts because as Union president she needed to attend meetings during the day and because she has a special needs child.[4] (Tr. 30.)

2 The change prompted the Charging Party Union to file a grievance and an unfair labor practice charge alleging that the Respondent breached the collective-bargaining agreement and failed to bargain with the Union by making a unilateral change.

3 While on union leave, Kasper would be paid by the Union for two 8-hour days per 28-day pay period. (Tr. 39, 63.)

4 In addition, the evidence shows that although Kasper had a Michigan address, she actually was residing in Texas, and had been traveling back and forth to work in Michigan since November 2001. (Tr.

Continued

On April 18, 2003, Goodwin wrote to Priscilla Horde, the Respondent's Director of Employee Relations, "requesting a leave of absence for Vickie Kasper due to union business for six months commencing as soon as it can be arranged." (GC Exh. 8.) Goodwin also stated that a six-month extension might be requested at the end of the initial six-month period. Horde received the letter on April 25.

Horde promptly responded on April 30, 2003, informing Goodwin that Kasper would be granted the six-month union leave of absence, effective May 1, 2003, and that a request for an extension would be considered when made. (GC Exh. 12 and 11.)

In the meantime, on April 24, 2003, a full-time, day shift, ICU RN position was posted. On April 30, the date that the posting closed, Kasper applied for the position indicating that she needed full-time employment. (GC Exh. 9.) Kasper took the union leave of absence, however, and did not pursue the job opening. (Tr. 68.)

On June 10, the Respondent denied the third step grievance concerning the contingent nurse shift change. The Charging Union appealed the matter to arbitration. Subsequently, the Board's Regional Director, the Respondent, and the Charging Party Union agreed that the pending ulp charge should be deferred to an arbitrator for decision under *Collyer Insulated Wire,*

84-85.)

192 NLRB 837 (1971).[5]

b. *Kasper resigns and reapplies for a job*

In the meantime, by letter, dated June 11, 2003, Kasper voluntarily resigned her employment with the Respondent, stating "[t]his is to inform you that effectively (sic) immediately I am tendering my resignation due to the denial of Step III grievance #03-31 by MCGH, (contingents denied day shifts and self scheduling) and my inability to work midnights." (Tr. 38; GC Exh. 14.)

One month later, on August 18, Kasper faxed an employment application to Horde seeking to return to work for the Respondent. Kasper's application did not indicate that she was applying for any particular job opening. (GC Exh. 15.) At a grievance meeting two days later, Horde told Kasper she had received the application, but wanted to know if Kasper had given two-weeks notice. (Tr. 42, 43.) Kasper told her that she had given four months notice, alluding to the fact that her union leave was not due to expire until November 2003. (Tr. 43.) Horde did

5 On March 15, 2004, the arbitrator sustained the grievance and issued an award finding that "[t]he collective bargaining agreement was violated when the employees' working conditions were unilaterally changed. The parties should bargain about these changes and what remedy should be provided for those affected….The employer's refusal to bargain on the changes for contingent nurses constituted an unfair labor practice." (GC Exh. 50, p. 48.)

not deny nor dispute that this conversation occurred or the substance of it.

c. *The September 30 discussion*

In late September 2003, Union Vice President Sulflow gave Kasper a copy of a job posting for a part-time RN position (#04122) in the telemetry unit.[6] (GC Exh. 16.) On September 26, Kasper faxed a copy of her resume to the human resources department in application for this posted position.[7] (GC Exh. 17.)

On September 30, as Kasper and Sulflow were leaving a grievance meeting, they saw a list of openings that were posted on a bulletin board outside of the human resources department. There are different recollections of the sequence and content of the discussion that followed.

(1) Kasper's recollection

Kasper testified that flexible shifts were eliminated from the contract during the last

6 The posting period ran from September 25 – October 2, 2003.

7 Kasper was applying from the "outside." The evidence shows that when a posted job is not filled by a current nurse employee, it remains open and can be filled from the outside by a nonemployee applicant. (Tr. 39-40, 361.) There is no evidence whether position #04122 was ever filled from the inside.

round of negotiations, so she and Sulflow asked to speak to Horde. (Tr. 46-47.) Horde told them that she would look into the matter at which point Sulflow pointed out that there were many job openings for which Kasper was qualified, and questioned why Kasper had not been hired for any of the jobs. According to Kasper, Horde stated that there was some question as to Kasper's commitment to the organization. (Tr. 48.) Kasper testified that she reminded Horde that she had been a long-term employee and that she was the Union president. (Tr. 48, 70.) Kasper testified that at that point Sulflow asked Horde "is [Kasper] was eligible for rehire? And Priscilla said I checked her file myself personally, yes, she is. And then Sandra said well then why hasn't she been hired? And [Horde] said I don't do the hiring and I don't do the interviews." (Tr. 48; 67.)

Kasper stated that Horde also asked her why she had resigned and Kasper responded "I resigned because I was getting ready to get fired for calling in and I wanted, I didn't want that on my resume so [Horde] said they weren't gonna fire you. You were on union leave. And I said, well, I couldn't stay on union leave because I couldn't work if I was on union leave."[8] (Tr. 49; 63,

8 Kasper testified that after she resigned she applied for "traveling nursing" jobs. These are assignments of limited duration (maybe 13 weeks) around the United States that would have required her to be away from home. (Tr. 64.) Kasper did not accept a traveling nurse job because it would have adversely impacted her ability to fulfill her Union president duties, particularly her ability to participate in collective-bargaining negotiations at the neighboring Crittendon Hospital. (Tr. 82.) She also testified that if she had accepted employment at any other metro Detroit area hospitals she would have been unable to fulfill her Union duties because she could not get time off work for Union duties. She therefore did not

Continued

87.)

Kasper testified that she wanted a copy of the open positions list, "[s]o we walked back into the, the human resources, went up to the desk of Assistant Recruiter Yvette Dominguez and asked her for the open positions, which they would let us look at but then it became a conflict about whether or not they were gonna give us a copy of those open positions." (Tr. 49.) She stated that eventually Horde told Dominguez to give them a copy. (GC Exh. 18.)

(2) Sulflow's recollection

According to Sulflow, after she and Kasper left the grievance meeting, they went to the job postings bulletin board in the human resources reception area to see which jobs were open to outside candidates. (Tr. 230.) Sulflow thought it would be useful for Kasper to have the latest list of openings for external candidates. She testified that she asked Ms. Dominguez for a copy of the external candidate list. (Tr. 230.) As Horde passed by she overheard the conversation and asked Sulflow why she wanted the list, since Sulflow receives all the job postings. Sulflow explained that she could not tell from the information that she received which openings were outside candidate openings. Although Horde was reluctant to provde a copy of the list, she eventually agreed to do so. (Tr. 231.)

apply to any other hospitals for employment. That being so, it is difficult to understand why Kasper resigned, rather than pursue a full-time position with the Respondent.

Sulflow testified that she, Kasper, and Horde then stepped into the hallway where she asked Horde why Kasper "who has been registering an interest in positions, for several months, had never received a call from the Hospital and yet, there was an extensive list of openings that were open to external candidates." (Tr. 233.) According to Sulflow, Horde stated that the Hospital was concerned about Kasper's commitment to the organization. Sulflow testified that at that point Kasper interjected stating "I have only worked at Mt. Clemens General Hospital since I became a Nurse. I am President of the Union. I have traveled 1,200 miles to come and meet my commitment to work. What do you mean by you are questioning my commitment to the organization?" (Tr. 233.) Sulflow stated that Horde told them that Kasper left without giving notice[9] (Tr. 233) to which Kasper replied, "how could I give notice? I was on leave, a union leave when I resigned from my position. I had to resign my position because, if I did not, I was going to be fired due to the fact that I was being deliberately scheduled for midnights – when I have worked here 12 years and everybody knows I could not work midnights." (Tr. 234.)

Sulflow testified that when she reiterated that Kasper was committed to a working for the Hospital, Horde told her that she did not do the hiring. (Tr. 234.) Sulflow asked Horde if she would tell the management team that Kasper was interested in returning. Sulflow testified that when it appeared to her that the reason that Kasper was not being considered for rehire was

9 Sulflow later testified that during this conversation Horde did not mention any concerns about Kasper not meeting employment schedules or fulfilling her hourly contingent commitment. (Tr. 273.)

because she did not give a two-week notice, she (Sulflow) asked Horde if Kasper was eligible for rehire? Specifically, she testified "I stated, at that time, what is her eligibility for rehire? It just dawned on me out of the blue and Priscilla said, well, I happen to have just checked on that and she is eligible for rehire." (Tr. 235, 240.)

(3) Horde's recollection

Horde concurred that a discussion began at the front desk when Sulflow asked Dominguez for a copy of the master list of job openings. Dominquez refused to give Sulflow a copy of the list because she was not sure that it was accurate. (Tr. 361.) Horde stated that she became involved when Dominguez turned to her for guidance. When she told Sulflow that she had not reviewed the list and that it might not be accurate, Sulflow accused her of holding back the list. (Tr. 362.) Eventually, Horde told Dominguez to give Sulflow a copy with the understanding that it might not be accurate.

Horde stated that at that point Sulflow asked to speak to her in the hallway. Outside in the hallway, Sulflow told Horde that Kasper had unsuccessfully applied for several positions. (Tr. 362.) Horde testified that

> I said to her, well, why isn't she able to get a position. And she goes, well, you know, because she resigned. And I said, and that's an issue that I would want to ask you guys. Why did she resign? And then, Sandra went on to explain, well, she couldn't work those hours. You know about her son, and so on, and so forth. And that was that discussion.

> At some point in time, she must have asked me again – well, because she gave notice or something. She was saying.
>
> Why aren't we allowing her to get a job? And I told her, I said, I don't have any idea but I will be willing to look into the Personnel file to check it out and let you know. And that was pretty much the extent of the conversation. (Tr. 363.)

Horde denied telling Kasper and Sulflow at that time or at any other time that Kasper was eligible for rehire. (Tr. 359, 363.)

(4) Credibility resolution

The evidence viewed as whole shows that on September 30, 2004, Kasper, Sulflow and Horde had a conversation in the hallway outside the human resources department during which they discussed Kasper's commitment to the Hospital, the reasons she resigned her employment, and whether she gave two-weeks notice of her intent to resign.

At issue is whether Horde told Sulflow and Kasper that Kasper was eligible for rehire. Sulflow testified that during the course of the conversation she asked Horde if Kasper was eligible for rehire and Horde answered affirmatively. Sulflow testimony is corroborated by Kasper. It is also consistent with content of the conversation. Horde's denial stands alone.

Sulflow's testimony on this point is credible for several reasons. First, it is corroborated by Kasper. Next, the unrebutted evidence shows that Horde had a reason and opportunity to review Kasper's eligibility for rehire prior to September 30, 2003. Horde had been in possession of Kasper's employment application for over a month and had discussed with Kasper her interest in returning to work at the August 20 grievance meeting. At that time, Horde inquired whether Kasper had given two-weeks notice when she resigned. Thus, the evidence viewed as a whole makes it more likely, than less, that Horde checked Kasper's personnel file long before September 30 in order to confirm whether Kasper had given two-weeks notice when she resigned.

In addition, the unrebutted evidence shows that on September 26, 2003, Kasper specifically applied for job opening #04122 by faxing a copy of her resume to the human resources department. (GC Exh. 16.) Thus, Horde had an additional reason and another opportunity to check Kasper's personnel file prior to the September 30 conversation.

Given her duties and responsibilities as human relations director, there is an expectation that Horde would check Kasper's file. Indeed, Horde testified that upon receipt of an application for reemployment, she typically would ascertain whether the employee was eligible to return to work and if so she would send the application on to the department where the vacancy existed. (Tr. 365.)

Finally, Horde did not state that she never checked Kasper's personnel file prior to September 30, 2003. Rather, she testified that she first saw a document indicating that Kasper

was ineligible for rehire after the September 30 discussion. (Tr. 356, 359.) While that may be true, it is conceivable that Horde checked the personnel file prior to September 30, but the file did not contain any documentation at that time indicating that Kasper was ineligible for rehire.

In contrast, Horde's uncorroborated denial is implausible. It is difficult to believe that more than 30 days after she received and discussed the employment application with Kasper, she would not have checked the personnel file of the Union president to determine her eligibility for rehire. If she had seen documentation in the file indicating that Kasper was not eligible for rehire, it is difficult to believe that Horde would have withheld that fact from Sulflow and Kasper during the conversation in the hallway. Moreover, Horde's rendition of the discussion was less precise and somewhat rambling in comparison to the testimony of Sulflow.

Accordingly, I credit Sulflow's testimony, as corroborated by Kasper, that Horde told them on September 30 that she had checked Kasper's personnel file and had determined that Kasper was eligible for rehire.

d. *Kasper is not rehired*

Later that day, on September 30, Kasper sent Horde a letter applying for ten job openings on the list that she received from Horde. (GC Exh. 19.) Among them was the part-time afternoon position in the telemetry unit that she specifically had applied for four days earlier. Horde testified that after receiving the letter, she subsequently checked Kasper's personnel file and saw for the first time an employee termination notice indicating that Kasper was ineligible

for rehire. (Tr. 363; R. Exh. 2.) Horde stated that she phoned Sulflow telling her that Kasper was ineligible for rehire. (Tr. 236.) After questioning Horde on how Kasper could be eligible one day and not the next, Sulflow phoned Kasper to tell her about her phone call with Horde and the reason given for not offering her a position. (Tr. 51, 236.)

On October 3, 2003, Kasper wrote to Horde authorizing Sulflow to pick up her personnel file. She also stated:

> For the record I would like to speak to the reason MCGH has deemed me not fit for rehire. The reason given was my not giving MCGH a two week notice. As you are aware I was on union leave until October and I resigned in June. It would seem my waiting to resign in October would have made it more difficult for the hospital to fill my position. As it is, by my resigning in June while not expected back to MCGH until October would have made it more difficult for the hospital to fill my position. As it is, by resigning in June while not expected back to MCGH until October gave MCGH the advantage of filing my position.

(GC Exh. 20.)

On the same day, October 3, Sulflow sent an email to Horde asking her to provide in writing the reemployment status of Kasper and the documentation used to support her rehire status. (Tr. 237; GC Exh. 46.)

On October 14, 2003, Horde responded as follows:

> Upon review of our records it is identified that Ms. Kasper resigned effective as of June 11, 2003 (see attached.) Therefore, consistent with the Hospital's Termination of Employment Policy, she is not eligible for rehire.

(GC Exh. 47.)

Notably, Horde's letter did state that Kasper was ineligible for rehire because of any prior disciplinary actions or her inability to work scheduled hours. Nor did Horde provide any documentation other than the resignation letter.

On October 24, Kasper wrote to Horde revoking her resignation on the grounds that the shift change violated the Act and the collective-bargaining agreement. (GC Exh. 21.)

2. Analysis and findings

Paragraph 11 of the amended complaint alleges that on August 18, 2003, the Respondent refused to hire its former employee, Vickie Kasper.

a. *The Legal Standard*

The General Counsel asserts that this case should be decided in accordance with *FES,* 331 NLRB 9 (2000). There, the Board set forth the analytical framework for deciding refusal-to-hire and refusal-to-consider cases. To meet his burden of proof in a discriminatory refusal-to-hire case, the General Counsel must show:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire applicants.

If the General Counsel meets this initial burden of proof, the burden shifts to the respondent to show that it would not have hired the alleged discriminatees even in the absence of their union activities or affiliation. If the respondent asserts that the applicants were not qualified for the available positions, it has the burden to show at the hearing on the merits that the applicants did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired the alleged discriminatees even in the absence of their union support or activity. 331 NLRB at 12.

The Respondent asserts that the analysis set forth in *Wright Line,* 251 NLRB 1083 (1980) should be applied in this case. It argues that the General Counsel must show that Vicki Kasper's Union activity was a motivating factor in the Respondent's decision not to rehire her. It asserts that at that point the burden shifts to the Respondent to show that it would not have rehired Kasper even in the absence of her Union activities.[10]

The Charging Party Union asserts that *NLRB v. Ford Radio & Mica Corp.,* 258 F. 2d 457 (2d Cir. 1958) provides the essential elements for deciding this case and under *NLRB v Fluor Daniel, Inc.,* 161 F.3d 953 (6th Cir. 1998), the General Counsel must establish two elements to carry its initial burden: antiunion animus and the occurrence of a covered action – for example, a particular discharge, or a particular failure to hire.

The instant case does not fit neatly into either the *FES* or *Wright Line* framework. FES typically is applied in cases where the employer is not represented by a union and there are several job applicants affiliated with a union that have applied for a job vacancy or vacancies,

10 The Respondent argues on page 8, fn 8 of its posthearing brief that Kasper had no preference over current employees who applied for vacancies and that the only other available positions were on the midnight shift, which Kasper could not work. It therefore argues that there were no positions available that Kasper would have taken. Contrary to the Respondent's assertions, there were numerous posted vacancies on the day and afternoon shifts that Kasper specifically applied for and was qualified to fill, which remained opened after she applied for them. See GC Exh. 18, 19 and 56.

but were not hired or considered for hire. In contrast, as the Board noted in *FES,* that in a typical *Wright Line* case, the alleged discriminatee generally is in the employer's work force and the question centers on why was he removed from the workforce. Here the Respondent has an established bargaining relationship with a union and the alleged discriminatee is a former long term employee and also the Union president, who applied and was not rehired for a posted vacancy.

There are some refusal to rehire cases, however, which predate *FES*, in which the *Wright Line* standard was applied with Board approval under circumstances similar to this case. See *National Steel & Shipbuilding Co.,* 324 NLRB 1114, 1117 (1997) (General Counsel's initial burden satisfied by ample evidence of animus directed specifically toward former union steward who had filed numerous grievances and was known for her stridency on behalf of the union); *Richardson Bros. Co.,* 312 NLRB 534 (1993)(General Counsel's initial burden showing employer unlawfully refused to rehire known union activist satisfied by evidence of general animus based on numerous other violations of the Act, including threats of plant closure and threatened refusal to bargain and other violations of Section 8(a)(1), (3), and (4).)

Under the circumstances of this case, I find that the *Wright Line* standard is more appropriate. The single applicant is a former employee of a unionized employer, and is also the Union president. As the evidence shows at the time of application there were several vacant posted positions for which she was qualified to fill.

b. *The General Counsel's evidence*

It is undisputed that Vicki Kasper worked for the Respondent as a licensed registered nurse for 11 years before voluntarily resigning on June 11, 2003. (GC Exh. 17.) It is also undisputed that Kasper is, and has been since 1998, the Union President, and in that capacity has participated in collective-bargaining negotiations, grievances, and arbitrations on behalf of unit members. The credible evidence further shows that on August 18, 2003, Kasper applied for reemployment with the Respondent and that there were several posted job openings that she was qualified to fill. In addition, on September 30. 2003, Kasper specifically applied for ten job vacancies any of which she was qualified to work. (GC Exh. 19, 18 and 56.) Thus, there is ample evidence showing that the first three prongs of *Wright Line* standard and the first two prongs of *FES* standard have been satisfied.

Regarding animus, the General Counsel asserts that general animus is established based on the Respondent's unlawful conduct in the prior case of *Mt. Clemens General Hospital,* 335 NLRB 48 (2001) enfd., 328 F.3d 837 (6th Cir. 2003). There, the Board affirmed the administrative law judge's findings and conclusions that in 1999 the Respondent violated Section 8(a)(1) of the Act by requiring nurses to remove overtime protest buttons from their nurses' uniforms. I do not agree that general animus can be established here based on the prior case for the following reasons.

Where a prior unfair labor practice violation has been used to establish animus in a pending case, the events in the prior case typically have occurred close in time and were often connected to the events underlying the alleged violation in the pending case. In addition, the

prior case animus was typically accompanied by independent evidence of animus in the pending case.

For example, in *Stark Electric, Inc (Stark II),* 327 NLRB 518 (1999), the Board affirmed the administrative law judge's findings and conclusions that in March 1996 the Respondent failed and refused to hire five union electricians. In addition to independent evidence of animus toward the five *Stark II* discriminatees, the Board found animus based on an unlawful derogatory statement made by the employer in May 1996 to a job applicant about the five *Stark II* discriminatees in the prior case of *Stark Electric, Inc., (Stark I),* 324 NLRB 1207 (1997). However, there, unlike here, the circumstances demonstrating animus in the prior case were closely related in time and factually connected to the circumstances in the pending case. See also, *Tama Meat Packing Corp. v. NLRB,* 575 F. 2d 661, 662-663 (8th Cir. 1978) (evidence adduced in 1975 unfair labor proceedings to establish animus in 1976 discharge proceeding was proper because of close proximity in time and because the animus in the prior adjudication was supported by other evidence of animus in the case pending); *NLRB v. Clinton Packing Co.,* 468 F.2d 953, 954 (8th Cir. 1972) (evidence of employer's prior unfair labor practice could be used to demonstrate animus in pending case because all the activities complained of in the prior and pending case occurred within approximately a one-year period and there was other evidence of animus in the case pending).

In the prior *Mt. Clemens* case, the unlawful prohibition against wearing the union protest buttons took place in October 1999, whereas in the instant case the alleged unlawful refusal to rehire took place in August/September 2003. The underlying events in the instant case therefore

are four years removed from those in the prior case and also there is no factual connection between them. I therefore decline to infer general animus in the present case based on unlawful conduct in the prior case.

The General Counsel also asserts that general animus should be inferred from a comment made by the administrative law judge in the prior case that after the Union took over in 1999 "the problems between the parties have escalated primarily because the incumbent union leadership has become more aggressive and vigilant in its defense of employee rights." *Mt. Clemens Hospital,* supra, 335 NLRB at 49. Aside from being *dicta*, the judge's remark characterizes the Union's conduct and not the Respondent's conduct and therefore falls short of supporting a reasonable inference of animus.

In addition, and as recently as the fall 2003, the parties to this proceeding (i.e., the General Counsel, the Charging Party Union, and the Respondent) agreed to defer to arbitration under *Collyer Insulated Wire,* 192 NLRB 837 (1971), an unfair labor practice charge, which was also the subject of a grievance asserting that the Respondent violated the collective-bargaining agreement and failed to bargain in good faith by unilaterally changing the hours of contingent nurses' shifts and work schedules. The Board has held that deferral is only appropriate where, among other things, there is no evidence that the employer is hostile to the exercise of protected statutory rights by its employees. *Branch International Services,* 327 NLRB 209, 218 (1998); *Textron, Inc.,* 1209, 1210 (1993). Thus, the evidence supports a reasonable inference that on or about the same time that the Respondent refused to rehire Vicki Kasper, all of the parties in the instant case were in agreement that the Respondent was not hostile to the

exercise of the employees' protected statutory rights. Otherwise, deferral under *Collyer* would have been improper. Thus, I find that the General Counsel's reliance on the prior case falls short of establishing general animus in the instant case.[11]

The General Counsel asserts, however, that direct evidence exists of specific animus towards Kasper's union activities. In support of this assertion, it relies exclusively on testimony by Employee Relations Director Priscilla Horde that in April 2003, Kasper's supervisor, Clinical Manager Kimberly Gainer and her boss, Director of Emergency and Critical Care Services, Susan Durst, asked Horde whether there was a basis for terminating Kasper after she failed to attend a conscious sedation training session on April 21, 2003. According to Horde, she told the two supervisors that she needed to review Kasper's overall record and she needed to know what disciplinary standard was being applied by managers to contingent nurses for no show/no calls. (Tr. 353.) In response to a follow-up question, Horde testified that "Vickie was certainly president of the Union and her actions were looked at you know with every staff member." (Tr. 410.)

11 Nor is there any evidence, or argument, that the alleged refusal to bargain/refusal to provide information violations in this case demonstrate animus toward the Union or its officers or its members. See Diamond Detective Agency, 339 NLRB No. 62 (2003)(employer's failure to bargain in good faith with Union in violation of Section 8(a)(5) not necessarily evidence of the employer's union animus); Denver Post Corp., 328 NLRB 118, fn. 2 (1999)(unilateral promotion of apprentices to provisional pressman status in violation of Section 8(a)(5) not evidence of antiunion animus).

In its posthearing brief at page 27, the General Counsel argues that the above-quoted statement shows the "Respondent's intense awareness of Kasper's status with the Charging Union and that she was under additional scrutiny as such." I disagree. The evidence viewed as a whole shows that Horde cautioned the managers to determine whether there was a standard being applied to all contingent nurses with respect to corrective actions for no call/no show incidents and then to assess Kasper's circumstances by applying the same standard to her. There is no evidence that in the course of counseling the managers Horde sought to treat Kasper any better or worse than any other employee because of her position with the Union or that Horde made any comments implying hostility toward Kasper because of her union activities. *Compare, Bryant & Stratton Business Institute,* 321 NLRB 1007,1031 (1996) (manager's admonition to supervisor to handle Union officer with "kid gloves" and strictly by the rules because he was the Union's bargaining committee chairman and because he would file charges against the employer for any perceived discrimination, strongly implied animus toward the union and the union officer because of his union activities.) I find that Horde's comment which was made during the trial is neither direct nor indirect evidence of animus toward Kasper because of her Union activities.[12]

12 Nor does the evidence show that the Respondent made statements to or about Kasper indicating that she was an overly aggressive, strident or difficult Union president or that Union at her direction filed too many grievances or Board-related charges. Compare, National Steel & Shipbuilding Co., 324 NLRB 1114 (1997) (manager's unlawful refusal to hire a former union steward was supported by ample

Continued

The General Counsel also asserts that Horde demonstrated the Respondent's animus toward Kasper because of her union activities in the September 30 conversation by expressing reservations about Kasper's commitment to the Hospital. The General Counsel does not elaborate on this position in its posthearing brief. There is no evidence showing that Horde was referring to Kasper's involvement with the Union as a lack of commitment to the Hospital. I therefore decline to infer animus from the statement.

However, the Board has stated that under certain circumstances (1) it will infer animus in the absence of direct evidence and (2) that evidence of unequal treatment is sufficient to satisfy the General Counsel's initial evidentiary burden. *Norman King Electric,* 334 NLRB 154, 158 (2001); *New Otani Hotel & Garden,* 325 NLRB 928, fn. 2 (1998). When Horde informed Sulflow in early October 2003, that Kasper was ineligible to return to work, the one and only reason given for the ineligible status was that Kasper had failed to give two-weeks notice when she resigned. (GC Exh. 47.) The credible evidence shows, however, that one year earlier on June

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evidence demonstrating his personal animus toward her because she aggressively represented union representation as reflected by various comments that he made to and about her union advocacy, as well as the hostility that he exhibited toward the union); United Parcel Service, 340 NLRB No. 89, slip op. at 2 and fn.10 (2003) (employer's animus was demonstrated by manager's statement to a discriminatee that he was a "troublemaker" for filing some many grievances and his intimidating comments to other employees about filing grievances).

28, 2002, another registered nurse, Ceclia A. Schweiger, resigned without giving two weeks notice, but nevertheless was deemed eligible for rehire by the Respondent. (GC Exh. 48; Tr. 485, 488.)

The evidence shows that Schweiger was working on a master's degree. She was not scheduled to work, and had not worked a single day in the 28-day schedule cycle, which began on June 6 and ended on July 3, 2002. (GC Exh. 48 at 9 and 10.) Indeed, the undisputed evidence shows that Schweiger's last day of actual work was April 28, 2002. By letter, dated June 27, 2002, Schweiger notified Horde that she was resigning her RN position with the Hospital. (GC Exh. 48 at 1.) Her resignation became effective the following day, June 28, 2002. (GC Exh. 48 at 10.) Schweiger nevertheless was deemed eligible for rehire even though she, like Kasper, resigned at a time during which she was not scheduled to work.

In a letter, dated January 30, 2004, to the Board's Agent investigating the underlying allegations, the Respondent's counsel sought to explain this inconsistent treatment as follows:

> Please find enclosed the resignation of Cecilia A. Schweiger, RN. Ms. Schweiger gave no effective date for her resignation. At the time of her resignation, she was not on the current 28 day schedule. Therefore her resignation was not in effect immediately and would not be in effect until the next 28 day schedule. To our knowledge, Ms. Schweiger had no disciplinary action in her file and her resignation would not be effective until the next 28 day schedule came out. The policy against rehire would

not necessarily apply to her. (GC Exh. 59.)

The explanation is disingenuous. The undisputed credible evidence shows that the next 28 day schedule began on July 4, 2002, which means by tendering her resignation on June 27, Schweiger at best gave six days notice. (GC Exh. 48 at 9.)

In comparison, Kasper was not on a 28-day schedule when she resigned and she was not due to return to work for another four months. (Tr. 364.) Her "immediate" resignation therefore had no impact on the Respondent's operation. Indeed, Kasper did not have a position to return to while she was on union leave. According to Article 12, Section 5.d of the collective-bargaining agreement, in order to for an employee, like Kasper, to return to work from union leave, she must first notify her supervisor of her availability for return to work and in that event the Respondent is required to offer the employee an equivalent position within 30 days of notification. (GC Exh. 2 at 70.)

Nowhere has the Respondent offered a reasonable explanation of why the two-week notice policy was applied to Kasper, but not to Schweiger. Respondent's counsel failed to do so in the January 30, 2004 letter. None of the Respondent's witnesses attempted an explanation at trial and there was no explanation proffered in the Respondent's posthearing brief.

Thus, the evidence viewed as a whole supports a reasonable inference of animus based on the unequal treatment of Kasper. I find that the two-week notice reason given by the Respondent in October 2003 for deeming Kasper ineligible for rehire is pretextual.

Accordingly, I find that under all of these circumstances, the General Counsel has satisfied its initial evidentiary burden, under the *Wright Line* standard, and therefore the evidentiary burden shifts to the Respondent.

c. *The Respondent's evidence*

(1) The shifted position

In its posthearing brief, the Respondent argues that, in addition to resigning without giving a two week notice, Kasper was deemed ineligible for rehire because of prior corrective actions, attendance issues, and no-calls/no shows. It points out, and the evidence shows, that on April 18, 2002, Kasper was given her first corrective action for no call/no show on April 2 and 3, 2002 and that on March 12, 2003, Kasper received her second corrective action for excessive calls ins on January 23 and March 1, 2003, as well as April 19 and October 24-25, 2002.[13] (R. Exh. 10 and 11.) The Respondent also asserts that Kasper repeatedly failed to meet her 16-hour contractual commitment as a contingent nurse from 2001-2003.

13 Contrary to the impression that the Respondent seeks to foster, the unrebutted credible evidence shows that Kasper did not receive a corrective action for not showing or calling for a training session on April 21, 2003. The unrebutted testimony of Chief Union Steward Michelle Campbell is that she dissuaded Clinical Manager Kimberly Gainer from issuing a corrective action to Kasper because no nurse had ever been disciplined for missing a training session in the past. (Tr. 495-496.)

The evidence shows, however, that these other factors were not proffered as reasons for refusing to rehire Kasper until four months after Horde phoned Sulflow in early October 2003 to tell Kasper was ineligible for rehire. According to Sulflow's unrebutted credible testimony, the only reason verbally ever given by Horde at that time for deeming Kasper ineligible for rehire was the failure to give two-week notice. The evidence shows that on October 3, Sulflow sent an email to Horde expressly asking her to provide in writing the reemployment status of Kasper and the documentation used to support her rehire status. (Tr. 237; GC Exh. 46.) On October 14, 2003, Horde responded as follows:

> Upon review of our records it is identified that Ms. Kasper resigned effective as of June 11, 2003 (see attached.) Therefore, consistent with the Hospital's Termination of Employment Policy, she is not eligible for rehire.

(GC Exh. 47.)

Notably, Horde's letter did not state that Kasper was ineligible for rehire because of any prior disciplinary actions or an inability to work her scheduled hours. Nor did Horde provide copies of the corrective actions or any documentation showing that Kasper failed to meet the 16-hour contingent nurse commitment.

Instead, the evidence shows that the other factors were first asserted in the letter, dated

January 30, 2004, from the Respondent's counsel to the Board's agent.[14] There, Respondent's counsel stated that the decision was made not to rehire Kasper because "[s]he had not worked any significant amount of time for the past two years, she had refused her last several scheduled times and she had several disciplinary actions in her file for not showing up for scheduled hours. She had tried to maintain a contingent status by getting others to take her schedule, when she in fact had moved out of state. She has not actually worked as a nurse for any significant amount of time for years." (GC Exh. 59.)

The evidence also shows that by the time of trial, the two-week notice reason was almost inconsequential, and that the other factors had become the principal reasons for not rehiring Kasper. Susan Durst, the director of emergency and critical care services, testified that she participated, along Clinical Manager Kimberly Gainer, in the decision to deem Kasper ineligible for rehire. At trial, she testified as follows:

> Q. And could you tell us why you decided that Ms. Kasper was not eligible for rehire:
>
> A. We had looked at the prior Corrective Actions, the current status of the attendance issue, and no call, no show. And then, lastly was the resignation

14 The evidence further shows that the assertion that corrective actions and a failure to meet the 16-hour commitment were the principal reasons for not rehiring Kasper was never made until after the underlying unfair labor practice charge was filed.

without notice.

Q. And of those, what was the most important reason?

(Tr. 422.)

A. Corrective Actions.
Q. And what would have been the next most important reason?
A. The Corrective Actions. Both the current and pending Corrective Actions based on absenteeism. There were some other Corrective Actions out there.
Q. Was there any reason for you to rehire this nurse?
A. No.
Q. Had she been meeting her obligations to work the 16 hours per schedule?
A. Not as of recent times.
Q. Okay. And when you say recent times, how far back?
A. Last year in a half maybe, two years.

(Tr. 423.)

The Board has held that shifting explanations for an employer's conduct support an inference of pretext and an inference that the true reason was unlawful. *Commercial Erectors, Inc.,* 342 NLRB No. 94, slip op. at 5 (2004) and cases cited therein. Under these circumstances, I find that the shifting explanation supports an inference that the other reasons asserted by the Respondent for not rehiring Kasper are also pretextual.

(2) Additional pretext evidence

A careful analysis of the evidence further supports an inference of pretext. The Respondent's evidence discloses that in the 2 ½ years prior to the date that Kasper went on union leave (May 1, 2003), she received only two corrective actions. R. Exh. 11 shows that on April 18, 2002, Kasper received her first corrective action "in last 18 months." According to the notation at the bottom of the exhibit, the no call/no shows on April 2 and 3, 2003, were considered one occurrence and not two infractions as the Respondent's implies in its posthearing brief. The next corrective action was not issued to Kasper until almost a year later on March 12, 2003, when Kasper received her second corrective action. Those are the only two corrective actions issued to Kasper in the 2 ½ years prior to her going on union leave. The undisputed evidence shows that R. Exh. 10, which is erroneously dated, April 2, 2003, was never given to Kasper and was never discussed with her by anyone in management. To the contrary, the unrebutted credible testimony of Chief Steward Campbell shows that Clinical Manager Gainer told that the corrective action (i.e., R. Exh. 10) would be "thrown away." Thus, contrary to the impression that the Respondent seeks to foster, Kasper had received only two corrective actions in the 18-month period before she went on union leave.

The Respondent's assertion that Kasper was not rehired because she did not meet her contingent commitment to work 16-hours per 28-day schedule is equally unpersuasive. To begin with, there is no evidence that the 16-hour requirement was uniformly enforced with respect to contingent nurses. Rather, the Respondent's evidence shows that when Gainer and

Durst asked Horde in April 2003 if there was a basis for terminating Kasper, she asked them what was the standard being applied to all contingent nurses, and neither supervisor could answer her question. Horde testified that she then initiated an informal email survey of the department managers and got a mixed response. Some had a standard, others did not. The results of her informal survey were mixed. (Tr. 407-408.) Indeed, in her June 27, 2002, resignation letter, RN Cecilia Schweiger opined that she was unfairly criticized by the Union for not meeting her contractual commitment, even though many other contingent nurses, including Vicki Kasper, were not meeting their contractual hourly commitments with the Respondent's knowledge and concurrence. (GC Exh. 48 at 1, para. 3.) Moreover, there is no evidence that any contingent nurse was disciplined for not meeting the contingent commitment.

Thus, the Respondent's reliance on the 16-hour commitment as a reason for not rehiring Kasper, in the absence of any evidence that it was applied in a uniform standard or that any other contingent nurse was disciplined for not meeting the requirement at any time, further supports a reasonable inference that it is pretextual reason for not rehiring Kasper.

(3) Disparate treatment

Finally, the unrebutted evidence shows that the Respondent had rehired other nurses, with an equal or greater number of corrective actions than Kasper. On November 12, 2001, the Respondent rehired Angela Larsen, even though she had received three corrective actions for absenteeism. (GC Exh. 54(a), (c)-(e).) On October 14, 2002, the Respondent rehired Tammy (Rottman) Affholter (Employee #8928), even though she had received two corrections for failing

to call-in, and had been verbally counseled for attendance. (GC Exh. 54(a), 54(j) and (k).) Neither at trial, nor in its posthearing brief, did the Respondent attempt to explain or distinguish why these nurses were treated differently than Kasper.

For all of the above reasons, I find that the Respondent's reasons for not rehiring are pretextual and that its decision was unlawfully motivated. According, I find that the Respondent violated Section 8(a)(3) of the Act by failing to rehire Vicki Kasper.

C. *Tax shelter annuity changes*

1. *Facts*

For over 20 years, the Respondent has made available to all its employees, bargaining unit and nonbargaining unit employees alike, a tax shelter annuity (TSA) program. Employees can elect to have money deducted on a pre-tax basis for a 403(b) plan. The program is not covered by the collective-bargaining agreement for either the registered nurses or the license practical nurses.[15] Between 1983-2003, the Respondent on several occasions increased and decreased the number of annuity providers from which the employees could chose without objection from and without bargaining with the Union.

Sometime prior to April 2003, the Respondent realized that its employees' participation in the TSA program was low compared to other hospitals. Upon further analysis, it concluded that the low participation rate was due to the fact that the Respondent did not sponsor any of the annuity providers. In 2003, there were five providers participating in the TSA program: MetLife Resources, Fidelity Investments, Prudential, Lincoln National, and Equitable. (R. Exh. 38.) Respondent surveyed these providers to determine which, if any, would be willing to provide the employees on-site retirement and investment counseling. Only MetLife expressed an interest in doing so. The Respondent therefore determined that MetLife would be the only provider available to the employees, who elected to participate in the TSA program.

In late April 2003, the Respondent met with the Union to announce its decision. Union

15 The RNs and LPNs have different negotiated pensions plans. (See GC Exh. 2, page 108 and GC Exh. 3, page 100.)

Vice President Sandra Sulflow, Chief RN Steward Michelle Campbell, and Chief LPN Steward Linda Sweeney attended for the Union. Human Resources Representative Paula Stacey and Benefits Coordinator Paula Mutch attended for the Respondent. Mutch explained that the Respondent was changing the TSA program and the reasons why. There would be only one provider, MetLife, instead of five and the Respondent would now administer the plan. Contributions previously made to the other four plans would be frozen or the employees could rollover the amounts in those plans into the MetLife plan.

Sulflow asked questions about the fees that would be charged by MetLife and how they compared to any fees that were charged by the other providers. Neither Stacey nor Mutch had that information at their finger tips, but they told Sulflow that it would be provided. On April 25, 2003, Mutch gave the Union an enrollment kit that it was providing to all employees. (R. Exh. 33.)

By letter, dated April 28, 2003, the Respondent advised all employees of the changes that were about to be made to the TSA program. (GC Exh. 36.) On April 29, the Union filed a grievance alleging that the Respondent violated the collective-bargaining agreement by unilaterally changing the TSA program and demanded that the Respondent "negotiate this."[16]

16 On April 29, Chief Steward Campbell also filed an information request concerning the new TSA program. (GC Exh. 31.) On May 5, she amended the request seeking information comparing the five plans (GC Exh. 32) and reiterated the request on May 16. (GC Exh. 33.)

(GC Exh. 30.)

On May 18, a second step grievance meeting was held regarding the TSA changes. The Respondent advised the Union that the information responsive to the Union's information requests was not available at the time, that the TSA changes were not negotiable, and that the grievance was denied. The Union did not pursue the grievance to arbitration.

By letter, dated July 2, 2003, the Respondent advised the employees that the new TSA program would begin on July 24, 2003. (GC Exh. 43.) Enrollment in the new plan had to be completed by July 11.

2. *Analysis and findings*

Paragraphs 22-24 and 26 of the amended complaint allege that on July 3, 2003, the Respondent unlawfully implemented changes in its RN and LPN Units employees' TSA pension plan without bargaining with the Union.

The General Counsel argues "that alterations in an employee pension and savings plan constitute a mandatory subject of bargaining" and that a waiver authorizing the cessation of pension benefit accruals must be incisive, direct, and specific. Quoting from *Trojan Yacht,* 319 NLRB 741 (1995), it further asserts that "assent by the Unions to the cessation of benefit accruals cannot be inferred here." Id. at 742. *Trojan Yacht* is factually distinguishable and therefore the General Counsel's reliance on that case is misplaced. There, the parties most

recent collective-bargaining agreement contained a pension and savings plan which covered both unit and nonunit employees. In an effort to maintain the plan's tax-exempt status, the employer, without notifying the unions and without bargaining, amended the plan to freeze benefit accruals during the contract term. The Board held that neither the management-rights nor the zipper clauses of the parties' contract gave the employer the right to amend the plan or waived the unions' interest in bargaining over the matter.

In the present case, it is undisputed that TSA plan is not, and has never been, covered by either the RN or LPN collective-bargaining agreements. It is also undisputed that throughout the history of the TSA plans, the Union has never bargained or sought to bargain with the Respondent over any change or aspect of the TSA program. Indeed, unlike *Trojan Yacht,* the RN collective-bargaining agreement here expressly states:

> Section 3
>
> The agreements concerning wages, hours and working conditions and statements of wage and fringe benefits expressed in this Agreement shall be the sole and exclusive source of any and all employee benefits. All employee benefit programs have been reviewed by the parties to these negotiations and those not expressly appearing within this Agreement are hereby specifically and expressly waived by the Union.

(GC Exh. 2, page 5-6.)

I find that this specific contract language shows that the matter asserted to be waived was fully discussed and consciously explored and that the Union consciously yielded its interest in bargaining over the TSA program as further demonstrated by its failure to request bargaining over any of the TSA program changes that occurred in the prior 20 or more years. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983); *Angelus Block Co.,* 250 NLRB 868, 877 (1980); See also, *Rockford Manor Care Facility,* 279 NLRB 1170 (1986) (where the employer successfully invoked a zipper clause, similar to the one here, to justify midterm adjustments to a contractually provided health care program).

Similar language appears in the LPN collective-bargaining agreement which states:

> **Section 3.** The agreements concerning wages, hours and working conditions and statements of wage and fringe benefits expressed in This Agreement shall be the sole and exclusive source of any and all bargaining unit benefits for those employees covered by this Agreement and shall be in lieu of any and all benefits expressed in any other document or statement of the Hospital pension programs, wage statements, fringe benefit statements or employee personnel booklets. It is further agreed that only the Hospital Chief Executive Officer or Chief Operating Officer may issue personnel policies which are binding on the Hospital and then only if in writing and signed by the issuer. (Emphasis

added.)

(GC Exh. 3, page 7.)

In *Columbus Electric Co.,* 270 NLRB 686 (1984), enfd. sub nom. *Electrical Workers IBEW Local 1466 v. NLRB,* 795 F.2d 150 (D.C. Cir. 1986), "the Board, with court approval, dismissed allegations that an employer violated Section 8(a)(5) and (1) by discontinuing a Christmas bonus never referred to in the parties' contracts. The contract contained comprehensive provisions on other types of compensation, provided that the contract would govern the parties' 'entire relationship" and stated that the contract would be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder *or otherwise.'* 270 NLRB at 687." *Trojan Yacht,* supra, 319 NLRB at 742. The contract language here likewise specifies that the agreement will be the "sole and exclusive source" of all bargaining unit benefits and shall be in lieu of any other Hospital provided pension programs.

In addition, according to Article II, Recognition, Section 1., of the LPN contract, the Union was certified by the Board as the exclusive bargaining representative on July 8, 1996. The TSA program therefore existed for several years prior to the collective-bargaining agreement which supports a reasonable inference that the Union was fully aware of the TSA program and consciously chose to yield any interest in bargaining over the matter when it agreed that the collective-bargaining agreement would be the sole and exclusive source of all benefits.

Moreover, the courts and the Board have held that a waiver also may be inferred from extrinsic evidence of the contract negotiations and/or practice. *Litton Microwave Cooking Products v. NLRB,* 868 F.2d 854, 858 (6th Cir. 1989); *Kiro, Inc.,* 317 NLRB 1325 1328 (1995); *California Pacific Medical Center,* 337 NLRB 910, 914 (2002). A waiver can be inferred here from the undisputed evidence showing that the Union never bargained over any TSA changes, never requested to bargain over them, and never objected to any of the changes.

Finally, in the recent case of *The Courier-Journal,* 342 NLRB No. 113, slip op. at 3 (2004) (*Courier Journal I)*, the Board found that a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo – not a violation of Section 8(a)(5). There, the collective-bargaining agreement provided for health insurance plans on the same terms in effect for unrepresented employees. It also ensured that any changes in the costs of a health insurance plan for unit employees would be on the same basis as unrepresented employees. The evidence showed that changes to the plan were implemented without bargaining consistent with a 12 year past practice. In each prior instance, the Union did not oppose, and instead accepted, the employer's changes which affected unit employees and unrepresented employees alike. The Board held that no violation of the Act occurred because the employer's actions were consistent with the past practice. See also, *Courier Journal,* 342 NLRB No. 118, slip op. at 1 (2004) (*Courier Journal II*).

The circumstances here present a stronger case for finding no violation because here there is no contractual language which provides for a collectively-bargained TSA plan. Instead, there is a 20 year history of making unilateral changes to the TSA program, which was accepted

without opposition by the Union.

For all of the reasons above, I find that the Respondent did not violate Section 8(a)(5) of the Act by reducing the number of TSA providers from five to one. Accordingly, I shall recommend the dismissal of allegations in the amended consolidated complaint alleging that the TSA program was unlawfully changed.

D. *Information Requests*

1. The applicable legal standard

The amended consolidated complaint contains five separate allegations (paras. 13-18) that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide requested information to the Union.

In *A-Plus Roofing, Inc.,* 295 NLRB 967, 970 (1989), the following applicable principles concerning requests for information were stated:

> An employer, pursuant to Section 8(a)(5) of the Act, has an obligation to provide requested information needed by the bargaining representative of its employees for the effective performance of the Respondent's duties and responsibilities. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967).

The employer's obligation includes the duty to supply information necessary to administer and police an existing collective-bargaining agreement (Id. at 435-438), and, if the requested information relates to an existing contract provision it thus is "information that is demonstrably necessary to the union if it is to perform its duty to enforce the agreement . . . . " *A.S. Abell Co.,* 230 NLRB 1112, 1113 (1977). Where the requested information concerns employees . . . within the bargaining unit covered by the agreement, this information is presumptively relevant and the employer has the burden of proving lack of relevance. With respect to such information, "the union is not required to show the precise relevance of the requested information to particular bargaining unit issues." *Proctor & Gamble Mfg. Co. v. NLRB,* 603 F.2d 1310 (8th Cir. 1979) at 1315. Where the request is for information concerning employees outside the bargaining unit, the Union must show that the information is relevant. *Brooklyn Union Gas Co.,* 220 NLRB 189 (1975); *Curtiss-Wright Corp.,* 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965). In either situation, however, the standard for discovery is the same: "a liberal discovery-type standard." *Loral Electronic Systems,* 253 NLRB 851, 853 (1980); *Acme Industrial,* supra at 432, 437. Th(i)s information need not necessarily be dispositive of the issue

> between the parties, it need only have some bearing on it. . . . [footnote omitted.]
> . . . .
>
> Once the initial showing of relevance has been made, "the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information." *San Diego Newspaper Guild* [*Local 95 v. NLRB,* 548 F.2d 863 (9th Cir. 1977)] at 863, 867.

This standard applies to all five information request allegations.

2. The TSA program changes

a. *Facts*

On April 29, 2003, after the hospital announced that only one TSA plan would be offered, the Union filed an information requesting the following:

1. All information/booklets/etc for the new MetLife benefits package for RNs.
2. Any changes this new benefit will cause compared to the old for RNs?

3. What fees are RNs now paying compared to the new benefit which P Mutch states MCGH will now be paying?
4. Any other relevant information related to this benefit change?

GC Exh. 31. (Tr. 173.) A short time later, Chief Steward Campbell filed an addendum information request seeking "all fund fee comparison chart between the 5 companies (TSA)." GC Exh. 32.

At the second step grievance meeting, Human Relations Representative Gloria Stacey told the Union that that the information was not available to give to the Union and that the TSA plan was not a negotiable issue. (Tr. 176.) On May 16, 2003, Campbell reiterated her previously filed requests for information. (GC Exh. 33; Tr. 176.)

By letter dated, May 19, 2003, Human Relations Director Horde responded to the Union's information request. (GC Exh. 34.) Campbell testified that Paula Mutch also sent Union Vice President Sandra Sulflow a letter giving a breakdown of the number of registered nurses covered by each plan and information on the fees. (Tr. 184, 260.)

The Respondent also held a series of meetings with employees to explain the new program and sent a series of letters sent to all employees explaining the new benefits. (Tr. 185.) A MetLife representative was present at the hospital to answer questions and to distribute information.

b. *Analysis and findings*

Paragraph 17 of the amended consolidated complaint alleges that since April 25, 2003, the Respondent has failed to provide the Union with information requested concerning changes to the TSA program.

The General Counsel argues that the requested information was necessary for the Union to process the grievance concerning the elimination of the TSA providers and to advise the Union membership of the impact of the changes. In the absence of a contractual provision concerning the TSA program and in light of the Union's waiver of the right to bargain collectively over any changes, the information sought was not relevant to administering or policing the contract. In addition, the evidence shows and the General Counsel in essence concedes that the requested information was provided, albeit not within 10 days from the original request.

Under these circumstances, I find that the Respondent did not violated Section 8(a)(5) of the Act. Accordingly, I shall recommend the dismissal of the allegation contained in paragraph 17 of the amended complaint and its related paragraphs.

3. Jodie Zablowski's personnel file

a. *Facts*

In early February 2003, Donna Reddman, a registered nurse, had an argument with

Jodie Zablowski, a security guard. Zablowski complained to the Respondent about Reddman's behavior. A week later, Reddman was called to her supervisor's office, where Clinical Manager Kim Gainer purportedly asked Reddman to provide her personal notes concerning the incident with Zablowski and threatened to suspend her if she did not provide the notes. (GC Exh. 22.)(Tr. 158-159.)

On February 16, Union Chief Steward Michelle Campbell filed a grievance on behalf of Reddman asserting that Reddmann had been unfairly prejudged, threatened, and directed to provide her personal notes. (GC Exh. 22.) The next day, Campbell sent an email to Priscilla Horde, Director of Human Relations, seeking "all corrective actions/grievances/verbal warnings against Jodie Zablowski, Security Guard." (Tr. 161, 327;GC Exh. 23.) Campbell testified that she sought the information on Zablowski because she had heard from others at the Hospital that Zablowski had a history of harassing employees and patients and that patient families had complained about her. (Tr. 163.)

On February 18, Horde responded by stating that the Hospital would not provide information regarding a nonbargaining unit employee's personnel record. She further stated that under the Michigan Bullard Pulwacki Act such information is confidential.[17] (Tr. 328.)

17 The evidence shows that Zablowski did not authorize the release of her personal records to the Union nor did the Union ask her to do so. (Tr. 198.)

The grievance was denied and Reddman received a corrective disciplinary action in connection with her argument with Zablowski. On February 21, Campbell filed another grievance disputing the corrective action. (Tr. 163;GC Exh. 24.) On March 3, a third grievance was filed seeking the documentation that the Respondent relied on in giving Reddman the corrective action. (GC Exh. 25.) On March 10, Campbell filed an information request seeking the same documents sought in the grievance. (Tr. 166;GC Exh. 26.) Eventually the Union obtained a copy of Zablowski's account of the incident and the Respondent removed the corrective action from Reddman's personnel file. (Tr. 197.)

b. *Analysis and findings*

Paragraph 13 of the amended complaint alleges that since February 17, 2003, has failed and refused to provide copies of "corrective actions/grievances/verbal warnings against Jodie Zablowski, Security Guard."

The undisputed evidence shows that Security Guard Jodie Zablowski is not a member of the bargaining unit represented by the Union. Thus, there is no presumption of relevance and the Union has the burden to demonstrate the relevance of and necessity for the information requested. *Tri-State Generation & Transmission Assn.,* 332 NLRB 910 (2000). I find that the Union has failed to carry its burden.

The information request sought "all corrective actions/grievances/verbal warnings against Jodie Zablowski, Security Guard," regardless of their underlying circumstances or the

nature of discipline. For all intents and purposes, the request arguably encompassed discipline arising out of attendance and tardiness infractions, improper documentation of security incidents, and everything and anything that dealt with any aspect of her job performance. In other words, the Union sought information that was not relevant to the argument between Reddman and Zablowski. In addition, the information request was based on "rumors" or at best, secondhand knowledge, that had been told to Campbell. There is no evidence that Campbell or anyone else in the Union sought to confirm the validity or accuracy of these stories before making the request. Under these circumstances, the General Counsel has not shown that the requested information was relevant. *Saginaw Control & Engineering, Inc.,* 339 NLRB 541, 545 (2003).

The General Counsel's reliance on *Earthgrains Baking Companies,* 327 NLRB 605 (1999) is misplaced. There, unlike here, the Union requested information concerning commissions arguably due to the bargaining unit employees which information was "presumptively relevant" to the Union's proper performance of its collective-bargaining duties. Thus, the employer in the first instance had the burden of proving that the confidential nature of the information sought outweighed the union's need for the information. In addition, in *Earthgrains*, unlike here, the evidence showed that the Union had a reasonable and objective basis for its concern that the collective-bargaining agreement was being breached whereas in the present case, the information request was based on unconfirmed rumors concerning prior incidents involving Zablowski.

Likewise, the circumstances in *Postal Service,* 305 NLRB 997 (1991) relied upon by the General Counsel are totally inapposite. In that case, the Union filed a grievance asserting that

nonbargaining unit postal inspectors imposed limitations on the representative role of a union steward during their interrogation of a bargaining unit employee and ultimately the inspectors forcibly ejected the union steward from the interrogation. The union filed an information request that specifically sought witness statements, as well as nonwitness opinions, comments, and recommendations contained in the investigatory file concerning the interrogation incident. It also sought documents discussing policies and practices governing the use of force by postal inspectors against stewards and employees in situations involving stewards engaged in representational duties. The Board found that this information was relevant to the processing of the union steward's grievance and that it outweighed the employer's interest in confidentiality. Notably, there, unlike here, the information request was tailored to the specific incident in question.

Accordingly, I find that the Respondent's failure to provide the information did not violate the Act and I shall recommend that the allegations in paragraph 13 of the amended complaint be dismissed.

4. Nurse externs and nurse interns

a. *Facts*

A nurse extern employed by the Respondent is a nurse, who has completed her formal education, has taken the nursing board examinations, and is awaiting the results. (Tr. 212.) An nurse intern is a nurse, who is in the process of completing her education and has not taken the board examinations. Neither nurse externs nor nurse interns belong to the bargaining unit.

When a nurse extern receives a bargaining unit position it is treated as a transfer, and her name appears on a transfer list and also a seniority list. Although both of these lists are supposed to be updated and provided to the Union on a monthly basis, Union Vice President Sandra Sulflow testified that does not always occur. (Tr. 261, 263.)

In March 2003, some registered nurses told Union Vice President Sandra Sulflow that nurse externs were being awarded positions over bargaining unit members in violation of the collective-bargaining agreement. (Tr. 213.) Sulflow testified that in her own area a bargaining unit member was denied a position that was awarded to a nurse extern. Sulflow brought the matter to the attention of the clinical manager, who rectified the situation by awarding the position to the bargaining unit member. (Tr. 213.) Sulflow also testified that occasionally names of externs and interns have appeared on a transfer list reflecting that they were working in a bargaining unit position, even though they were not licensed registered nurses. (Tr. 266.)

On March 28, 2003, Sulflow sent an email to Human Relations Director Priscilla Horde requesting the names and position numbers of all externs and interns employed by the Respondent. (GC Exh. 35.) She testified that she sought their names in order to check them off the change in status report of transfers.[18] (Tr. 264.) Horde responded by telling Sulflow that she

18 Sulflow also testified that she asked for a copy of the job descriptions being worked by each nurse extern and nurse intern. (Tr. 214, 262.) That additional information request, however, is not apparent from the face of the email. (GC Exh. 35.)

would formally respond by midweek, but that she was not obligated to provide information concerning nonbargaining unit employees, "so I owe you no names of our staff that you do not represent." (Tr. 330; GC Exh. 35.) She eventually provided the job descriptions, but would not provide names of the nurse externs or nurse interns.

b. *Analysis and findings*

Paragraph 14 of the amended complaint alleges that since March 28, 2003, has failed and refused to provide "a list with the differential designation of all Nurse Interns and Nurse Externs."

It is undisputed that the Union sought information concerning nonbargaining unit employees. Thus, the Union has the burden of showing that the information is relevant to bargainable issues. The standard for discovery, however, is "a liberal discovery-type standard." *Loral Electronic Systems,* 253 NLRB 851, 853 (1980); *Acme Industrial,* supra at 432, 437. The information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it.

The evidence shows that the Union sought the names and position numbers of all the externs and interns because registered nurses had complained that nurse externs were improperly filling bargaining unit positions in violation of the collective-bargaining agreement. Union Vice President Sandra Sulflow asserted that she had personal knowledge of one such instance on her unit, which she addressed with the clinical manager. That prompted her to seek

the information requested in order to cross-check the names and position numbers against the transfer lists, which were not always provided on a timely basis. The Respondent did not deny that nurse externs and nurse interns had improperly filled bargaining unit positions on occasion. It also did not deny that the names of nurse externs and nurse interns had improperly appeared at times on the bargaining unit seniority list and that the transfer lists were not always provided on a timely basis.

The preservation of bargaining unit work is a subject of mandatory bargaining under the Act. *Fibreboard Paper Products Corp. v. NLRB,* 379 US 203, 209 (1964). Where, as here, the Union has a reasonable ground to fear that unit work is being performed by nonbargaining unit employees, the courts and the Board have held that information pertaining to the nonbargaining unit employees is relevant and should be provided. See *NLRB v. Rockwell-Standard Corp.,* 410 F.2d 953 (6th Cir. 1969); *NLRB v. Goodyear Aerospace Corp.,* 388 F.2d 673 (6th Cir. 1968); *Ohio Power Co.,* 216 NLRB 987 (1975).

The information sought by the Union is relevant to Union's responsibility to monitor the collective-bargaining agreement. Accordingly, I find that under these circumstances the Respondent unlawfully withheld the information sought by the Union in violation of Section 8(a)(5) of the Act as alleged in paragraph 14 of the amended complaint.

5. Joy Johnson's personnel file

a. *Facts*

Joy Johnson was formerly employed by the Respondent as an licensed practical nurse (LPN). She also was the vice president of the LPN bargaining unit. (Tr. 23, 320.) On April 7, 2003, Union President Vicki Kasper submitted a written information request to Priscilla Horde, Director of Employee Relations, in connection with a discipline issued to Johnson. (Tr. 24; GC Exh. 4; R. Exh. 52.) Specifically, Kasper asked to review Johnson's personnel file, all documents used in making the decision to discipline Johnson (including the names of any witnesses and their statements), and for the names of other employees who committed the same offense and the penalties imposed. Kasper asked that the information be provided by April 14, but it was not provided.

On April 17, Kasper sent a similar request to David Klinger, Vice President of Human Resources. (Tr. 25; GC Exh. 5.) On April 22, Employee Relations Representative Gloria Stacey responded by providing "the information used in making the decision to discipline her," but not the personnel file. (Tr. 26; GC Exh. 6.) The April 22 letter stated that under the Michigan Bullard-Plawecki Employee Right to Know Act, the employee must make the request herself. Stacey stated the Hospital had "a procedure whereby [Johnson could] fill out a form in the Human Resources Department requesting to see her file." (Tr. 54.) Johnson made such a request and was allowed to review her personnel file. She did not request a copy of any information in her file. (Tr. 55, 321.)

b. *Analysis and findings*

The amended complaint alleges that since April 17, 2003, the Respondent has failed to provide LPN Unit employee's Joy Johnson's personnel file.[19] The allegation is not accurate because Johnson requested and was allowed to review her personnel file. Rather, the issue here is whether the Respondent was entitled to deny the Union access to Johnson's personnel file unless she signed a written authorization.

The undisputed evidence shows that Johnson was a bargaining unit employee and it is beyond dispute that a review of her personnel file was relevant to the investigation of her discipline and the processing of her grievance. At trial, Horde testified that it is Hospital policy not to release personnel files without the permission of the employee (Tr. 323) and therefore it was not obligated under the Act to provide the personnel file without Johnson's permission.[20] (Tr. 320.) In essence, the Respondent asserts that pursuant to its policy its employees' personnel files are per se confidential and that under *Detroit Edison Co. v. NLRB,* 440 US 301 (1979) and *New Jersey Bell Telephone Co.,* 720 F.2d 789 (3d Cir. 1983) (*New Jersey Bell I)* it was not required to release the personnel file without employee authorization.

However, in *Wayne Memorial Hospital Assn.,* 322 NLRB 100, 102-103 (1996), the Board

19 Although Johnson requested and was allowed to review her personnel file, a copy was not provided to the Union.

20 There is no evidence or argument that Johnson's personnel file contained information of an intimate and highly personal nature.

squarely rejected that argument and since then has repeatedly stated that blanket confidentiality claims are not an adequate defense for an employer's per se refusal to furnish any information from an employee's file. *Washington Gas Light Co.*, 273 NLRB 116 (1984); *Southwestern Bell Telephone Co.,* 251 NLRB 612 (1980); and *Fawcett Printing Corp.,* 201 NLRB 964 (1973). Indeed, in *New Jersey Bell Telephone Co.,* 289 NLRB 318, 318-319 (1988) (*New Jersey Bell II)*, the Board specifically found where, as here, there is no evidence that the personnel file contained information of an "intimate and highly personal nature" *Detroit Edison Co.* and *New Jersey Bell I* are not controlling.

Specifically, in *New Jersey Bell II*, the Board stated:

> Regarding the Respondent's position generally that it should be entitled to deny requests for relevant information from personnel records simply because its privacy plan requires an employee consent, we find no support in *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979), on which the Respondent also relies, for any such blanket claim of confidentiality. See *Pfizer, Inc.,* 268 NLRB 916, 919 (1984), enfd. sub nom. *NLRB v. Electrical Workers IBEW Local 309,* 763 F.2d 887 (7th Cir. 1985); *Oil Workers Local 6-418 v. NLRB,* 711 F.2d 348, 362 and fn. 36 (D.C. Cir. 1983). Certainly an employer should not be able to "bootstrap" a confidentiality claim as a barrier to disclosure of information to the bargaining representative simply by relying on a plan through which employees, including bargaining unit employees, are

> promised that a broad range of personal information will remain confidential. Moreover, the mere fact that an employee does not give formal consent – or might even object – to the disclosure of information does not *in itself* constitute grounds for refusing to provide such information when it is relevant to the bargaining representative's performance of its representational duties.
>
> 289 NLRB at 319.

By relying on its policy in refusing to allow the Union to review and copy Joy Johnson's personnel file, the Respondent has failed to satisfy its burden of showing that it had a legitimate confidentiality claim. Accordingly, I find that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the personnel file of bargaining unit employee Joy Johnson to the Union without employee consent.

6. Reclaiming in-patient beds

a. *Facts*

On January 15, 2003, the Respondent and the Union held a monthly conference that was attended by, among others, Priscilla Horde, Susan Durst, Joan Simon and Denise Wojewoda for the Hospital and Vicki Kasper, Sandra Sulflow, and Michelle Campbell for the

Union. (Tr. 279, 425;R. Exh. 22.) In the course of the meeting, the Respondent told the Union that it was adding 13 additional beds in certain units in the hospital to meet the increasing census. Sandra Sulflow testified that Joan Simon lead the discussion for the Hospital. The Union was told that the Hospital is licensed to operate 288 patient beds. (Tr. 191.) Over the course of time, and as the census decreased, several patient rooms were converted to offices for managers and administrative staff. With the increasing census, the Hospital planned to convert several offices back into patient rooms and reclaim 13 patient beds, which would bring the total of available beds close to the 288 bed maximum. (Tr. 267-268.)

Sulflow testified that she was concerned that the workload would be increased for the registered nurses on certain units. (Tr.169, 267.) The Union wanted to get a breakdown on the number of beds per unit because if the patient census increased on a unit, it might impact on staffing and require an increase in staff. (Tr. 269.) According to Sulflow, if the Hospital changed the nurse/patient ratio, the Union would take the position that the Hospital had changed a condition of employment, i.e., staffing. (Tr. 270-271.) Sulflow stated that she asked Simon for a breakdown of the number of beds and the units that would receive them, but was not given a breakdown. However, Sulflow was unable to recall how Simon responded to her question about the breakdown. (Tr. 268.)

Denise Wojewoda was also present at the January 2003 meeting. At that time, she was the Director of Maternal, Child and Medical Surgical Units. Wojewoda testified that the Union was told that the Hospital had 288 licensed beds and it was going to be reclaiming some of those beds. Because some of the patient rooms were being used as offices they would be

renovated and converted to be patient rooms again. According to Wojewoda, the Union was told that the 4th floor (4West), 3rd floor (3West), 4th floor (4South), and one room on telemetry care unit (TCU) would be renovated. (Tr. 279.) Wojewoda explained that at this point (January 2003) nothing had been done to implement the plan. (Tr. 281.) The Hospital was accepting bids for the construction and then it had to move the managers to other floors. After renovating the manager offices, it would convert the rooms vacated by the managers to patient rooms. Gradually, one or two patient rooms would be opened up at a time. Wojewoda did not recall the Union asking Joan Simon where the reclaimed beds were going to be located or Simon refusing to give an answer. (Tr. 282.) Simon was not called as a witness for the Respondent.

Susan Durst testified she told the Union that the Hospital could add one bed in the PCU and it could add four beds in the TCU. (Tr. 426, 428.) At the time of the meeting, however, the Hospital had not opened up any beds. (Tr. 428.) She stated that she "believed" that she gave this information to the Union at the meeting. (Tr. 428-429.) She added that the Hospital never added a bed to PCU and that it never reclaimed all the available beds to reach the 288 licensed beds maximum. (Tr. 427-428.)

Human Relations Director Horde testified that the location of the beds was discussed at the January 2003 meeting, but she could not remember where all the beds where. (Tr. 325.) In response to a question by Respondent's counsel, she stated that there were not any questions asked by the union at the meeting that were not answered. (Tr. 326.)

On April 18, 2003, Chief Union Steward Campbell filed a grievance on behalf of the registered nurses in the telemetry care unit seeking to remove the general medical floor beds. (GC Exh. 28.) On the same date, she filed an information request seeking the following information pertinent to the issue at hand:

1. How many beds did MCGH open to this date (4/18/03)? Which nursing have been affected by openings? How many beds on which units?
2. Are the beds opened licensed?

GC Exh. 29. (Tr. 170.)

Campbell testified that she did not receive a response to either of these requests. (Tr. 171, 193, 204-205.) She further testified that other than the TCU, she did not know where the other reclaimed beds were added. (Tr. 193.)

Horde testified that she never received a specific information request concerning the number and location of the reclaimed beds. (Tr. 326.) Her assertion is unpersuasive. The Respondent's answer to the amended complaint admits that the request was received. (Ans. para. 21.) Horde did not deny that the email address that appeared at the top of the information request was her email address or otherwise explain why she did not receive the information request sent by Campbell. (See G.C. Exh. 29.) Instead, Horde testified that at a April 29, 2003, grievance meeting, the number and locations of the beds were discussed with the Union, the grievance was denied, and the Union did not pursue the matter. (Tr. 326; R. Exh. 22.)

b. *Analysis and findings*

Paragraphs 16 and 21 of the amended complaint alleges that since April 18, 2003, the Respondent has dilatorily failed and refused to provide the number of beds that were added to specialized hospital units.

There is no argument or dispute that the information sought was relevant to the Union's role as the collective bargaining representative. Rather, in its posthearing brief the Respondent asserts that it gave the information to the Union twice. Once during the January 2003 meeting and then in the course of the grievance procedure. I disagree.

Although the Respondent told the Union in January 2003 of its intention to reclaim 13 beds in certain units, the credible evidence shows that the specifics were not layed out for the Union at the January 2003, but instead the discussion focused on what could take place. Indeed, the evidence viewed as a whole shows that in January 2003 the Respondent's plan was in the early stages. The renovations had not started, the units had not been converted back to patient areas, and there was not a firm sense of exactly how many new beds would be needed and where. Although the Respondent knew the number of beds that it could reclaim and the units where they wanted to add them, there is no evidence showing that the exact number per unit had been discussed in January 2003. Instead, the evidence shows that contrary to expectations the bed that was to be added to the PCU was not opened.

In addition, Horde's testimony that the information sought in the Union's request nos. 1 and 2 above was provided to the Union during the grievance meeting is dubious for several reasons. First, the credible evidence reflects that Horde had no personal knowledge of what was discussed at the grievance meeting. She testified that it was a grievance over the fact "[t]hat the Hospital had reclaimed 13 beds." (Tr. 326.) A plain reading of the grievance discloses that it pertained to the TCU only and that it sought the removal of four beds in that unit that the Union knew had been reclaimed. (GC Exh. 28.) Second, the evidence shows that Horde was not even present at the April 29 grievance meeting, so she had no first hand knowledge of what was discussed with the Union. (See R. Exh. 22 – "Present for the Hospital was Joan Simon, Vice President, Clinical Services; and Gloria Stacey, Employee Relations Representative.") Neither Simon or Stacey were called by the Respondent to testify which warrants an adverse inference that they would not have corroborated Horde's testimony on this point. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). Finally, Chief Union Steward Campbell, who was present at the grievance meeting, credibly testified that the information she requested on April 18, 2003, was not provided at the grievance meeting. (Tr. 171; 193, 204-205; GC Exh. 29.) Indeed, a careful review of the 2nd Step grievance response shows that there was no discussion of the other reclaimed beds. (See R. Exh. 22.) Thus, the credible evidence viewed as whole shows that the Respondent failed to respond to the information request.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act as alleged in paragraphs 16 and 21 of the amended complaint.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to rehire Vicki Kasper-Monczk,

4. The Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the following requested information:

(a) The names and position numbers of all nurse externs and nurse interns.
(b) The personnel file of Joy Johnson.
(c) The number of general beds that were added to specialized Hospital units.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not otherwise engage in any other unfair labor practice alleged in the amended consolidated complaint in violation of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent failed and refused to rehire Vicki Kasper-Monczk in violation of Section 8(a)(3) and (1) of the Act, it must immediately offer her employment as a registered nurse on the day or afternoon shift and, if necessary, terminate the service of any employee hired in her stead, and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from August 18, 2003, to the date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Mt. Clemens General Hospital, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to rehire Vicki Kasper-Monczk because of her known union activities and official position with the RN Staff Council, OPEIU, AFL-CIO.

(b) Failing and refusing to provide requested information to the RN Staff Council, OPEIU, AFL-CIO that is necessary for it to perform its role as the exclusive collective-bargaining representative of the registered nurse bargaining unit employees and the licensed practical nurse bargaining unit employees of the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Vicki Kasper-Monczk employment as a registered nurse on the day or afternoon shift and, if necessary, terminate the service of any employee hired in her stead.

(b) Make Vicki Kasper-Monczk whole for any loss of earnings, seniority, and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any documents that reference that Vicki Kasper-Monczk was ineligible for rehire on or after June 11, 2003, and within 3 days thereafter notify her in writing that this has been done and notify her in writing that the employee termination notice that was completed after she resigned on June 11, 2003, will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Mt. Clemens,

Michigan, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., January 7, 2005

C. Richard Miserendino
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to rehire Vicki Kasper-Monczk or any other employee because they are engaged in union activities and/or are a union officer for the RN Staff Council, OPEIU, AFL-CIO or any other labor organization.

WE WILL NOT fail or refuse to provide information to the RN Staff Council, OPEIU, AFL-CIO, that is necessary for it to perform its duties as the exclusive collective-bargaining representative of our employees in the registered nurses' bargaining unit or the licensed practical nurses' bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Vicki Kasper-Monczk employment as a registered nurse on the day or afternoon shift and if necessary terminate the service of any employee hired in her stead.

WE WILL make Vicki Kasper-Monczk whole for any loss of earnings, seniority, and other benefits resulting from our refusal to rehire her, less any net interim earnings, plus interest.

WE WILL provide the RN Staff Council, OPEIU, AFL-CIO, with copies of any information that it requests that is necessary for it to perform its duties as the exclusive collective-bargaining representative of our employees in the registered nurses' bargaining unit or the licensed practical nurses' bargaining unit.

MT. CLEMENS GENERAL HOSPITAL

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 a.m. to 4:45 p.m.
313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE

REGIONAL OFFICE'S
COMPLIANCE OFFICER, 313-226-3244.